UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FLAUM APPETIZING CORP.

and	**Case Nos.**	**29-CA-28502**
		29-CA-28675
LOCAL 460/640, INDUSTRIAL WORKERS		**29-CA-28854**
OF THE WORLD a/k/a INDUSTRIAL WORKERS		**29-CA-28951**
OF THE WORLD, NEW YORK CITY GENERAL MEMBERSHIP BRANCH		

Nancy Lipin, Esq. and Annie Hsu, Esq.,
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Counsel for the Respondent
Jim Crutchfield, on behalf of the
Charging Party

Statement of the Case

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases in Brooklyn New York on September 23, 24 and 25, October 2, 3, 6 and 7 and November 17 and 18, 2008.

The charges in 29-CA-28502 and 29-CA-28675 were filed on August 27 and December 12, 2007 and a Complaint based on those charges was issued on December 21, 2007. The charge and amended charges in 29-CA-28854 were filed on April 3, May 19 and July 15, 2008. The charge and amended charge in 29-CA-28951 were filed on May 27 and August 11, 2008. Thereafter an Order Consolidating Cases and Consolidated Complaint based on all of the above charges were issued by the Regional Director on July 21, 2008. As subsequently amended on August 13, 2008, the Consolidated Compliant alleged as follows:

1. That on or about August 13, 2007, the Respondent by Moshe Grunhut, its owner and president and by Abraham Weiss, a supervisor **(a)** interrogated employees about their union activities, **(b)** solicited grievances and promised employees that they would be resolved in order to persuade them to abandon the Union and **(c)** directed employees to leave its Brooklyn facility through the back door in order to prevent them from talking to union representatives.

2. That on or about August 13, 2007, the Respondent by Weiss engaged in surveillance of employees' union activities.

3. That on or about August 14 and 15, 2007, the Respondent by Grunhut **(a)** interrogated employees about the Union, **(b)** told employees that they were being disloyal for supporting the Union, and **(c)** solicited grievance and premised to correct them.

4. That on or about August 17, 2007, the Respondent by Grunhut and Aviram Chen, its operations manager and Norma Ramirez a translator/supervisor, **(a)** promised employees

benefits in order to persuade them to abandon their union support and **(b)** promised employees $375 to abandon the Union.

5. That on or about August 18, 2007, the Respondent by Chen, Weiss, Ramirez and Solomon Itzkowitz, a notary, in an effort to persuade employees to abandon their support for the Union, **(a)** promised employees benefits **(b)** directed employees not to talk to union representatives, **(c)** paid employees $375 or other amounts, **(d)** promised employees a wage increase and other benefits and **(e)** directed employees not to speak together in groups at the facility about the Union.

6. That on or about August 30, 2007, the Respondent by Chen and Itzkowitz **(a)** promised benefits to employees and **(b)** told employees that it was futile for them to support the Union.

7. That on or about September 7, 2008, the Respondent by Grunhut, in an effort to dissuade employees from supporting the Union, promised to provide an employee with day shift work and provided an employee with a free lunch.

8. That on or about October 2007, the Respondent by Norma Ramirez, in an effort to dissuade employees from supporting the Union, **(a)** interrogated employees about their union support **(b)** threatened employees with discharge and **(c)** threatened employees with immigration problems.

9. That on various dates from September 2007 through May 2008, the Respondent granted employees the benefits of **(a)** providing a water cooler for employee use, **(b)** providing employees with a refrigerator, **(c)** paying for a day off on Thanksgiving, **(d)** paying for a day off on Christmas, **(e)** paying for a day off on New Years, **(f)** granting employees a one week vacation **(g)** paying for a day off on an employee's birthday and **(h)** paying employees for overtime work.

10. That in mid-January 2008, the Respondent by David Ganz, a labor relations consultant, told employees that he had a union for them to select.

11. That in mid-January 2008, the Respondent by Ganz and/or Carmen, told employees that it would be futile for them to select a union.

12. That in late January 2008, the Respondent imposed more onerous working conditions on Irma Juarez by transferring her from the salad area to the kitchen.

13. That in or around early April 2008, the Respondent unilaterally and without bargaining, implemented the following new conditions of employment; **(a)** requiring employees to change uniforms before punching in, **(b)** requiring employees to change out of their uniforms after punching out, **(c)** requiring employees to punch out if they left the facility during their lunch break, **(d)** not paying employees if they left the facility during lunch breaks and **(e)** forbidding employees from using their cell phones at work.

14. That on or about April 4, 2008 the Respondent by Chen, interrogated employees about the filing of charges at the NLRB. (See testimony of Maria Corona)

15. That on or about April 4, 2008, the Respondent changed the working conditions of Maria Corona by requiring her to document her absences from work because she was named in

the charge in 29-CA-288855 and participated in the investigation of other unfair labor practice charges.

16. That on or about May 26, 2008, the Respondent discharged employees who engaged in a work stoppage to protest the discharge of Maria Corona on May 22, 2008. Alternatively, it is alleged that if it is concluded that these employees were not discharged, then the Respondent refused to reinstate them after they made an unconditional offer to return to work on or about May 28, 2008.

17. That on or about June 20, 2008, the Respondent by Grunhut, conditioned the reinstatement of the employees on their abandonment of the Union.

19. That by November 9, 2007, a majority of the employees in a unit appropriate for collective bargaining designated the Union as their bargaining representative.

20. That because of the unfair labor practices described above, the Respondent has made a fair and free election impossible and therefore a bargaining order should be granted to the Union as an appropriate remedy.

The Respondent did not seriously contest many of the allegations of the Complaint. It did, however, make the following contentions.

The Respondent contends that some of the alleged statements were made by people who were neither supervisors nor agents of the Respondent. Thus, the Respondent asserts that Weiss, Ramirez and Carmen are not supervisors or agents. As to Ramirez, although the Respondent concedes that there were occasions when she was used as a translator between management and employees, and can be considered as an agent for those limited transactions, she was not otherwise a supervisor or agent for any other alleged conversations.

The Respondent contends that no employees were discharged in relation to what it considers to have been a strike to protest the discharge of Maria Corona. In this regard, the General Counsel does not allege that the discharge of Corona was a violation of the Act and therefore, the strike which was to protest her discharge cannot be considered to be an unfair labor practice strike.

The Respondent contends that although it did refuse to reinstate most of the strikers, it did not have a legal obligation to do so because the offers to return to work were not unconditional. I note here that the Respondent did not offer evidence that it had permanently replaced any of the strikers.

The Respondent contends that the Union never obtained a valid majority and therefore no bargaining order can be granted. It also contends that the alleged unfair labor practices, even if committed, would not make a fair election impossible.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the arguments made, I make the following

[1] The General Counsel's unopposed Motion to Correct the Transcript is hereby granted.

I. Jurisdiction

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is conceded and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

(a) Background and Unit

The Company is engaged in the wholesaling of kosher food products. The parties stipulated that an appropriate unit would include all full-time and regular part-time plant employees, drivers and helpers employed at the Company's Brooklyn facility, but exclude sales employees, office clerical employees, guard and supervisors as defined in the Act. During the period in which these events took place, the unit would have consisted of between 37 and 39 individuals depending upon the status of a few individuals.[2]

The owner of the Company is Moishe Grunhut and the General Manager is Aviran Chen.

The General Counsel has alleged that Abraham Weiss was a supervisor, but the evidence does not support that contention. Although Weiss, at one time, was the General Manager, he lost that position when Aviran Chen was hired. Weiss effectively was demoted to a general worker who was assigned to be a kind of jack of all trades within the plant. At the time of these events, he did not have any of the powers or authorities set forth in Section 2(11) of the Act. His income was essentially the same as the other plant workers. (Around $7+ per hour).

It also is alleged that there was another person named Carmen who was employed as a supervisor within the meaning of the Act. She was hired in November 2007 and does not appear on the Company's payroll records. Carmen did not testify and the others who described her work functions were a bit vague, albeit two or three employees testified that on one occasion, Aviran Chen told them that they were to follow orders from Carmen and that she was their supervisor. Although there was testimony by a few employees that Carmen gave out work orders and shifted people from one area to another, it seems to me that she was, at most, a lead person. To the extent that she had any authority at this facility, that seems to me to be a consequence of her ability to speak Spanish and English and to translate from management to the employees and visa versa. When directly involved as a translator, or when transmitting an order from management, she clearly would be an agent. But as a person who, outside of those contexts, told employees about company policy, I think that she spoke for herself.

(b) First Contact

In or about June or July 2008, the Union, (sometimes referred to as the IWW), commenced an organizing campaign at the Respondent. Billy Randel was in charge of the organizing efforts.

[2] The parties stipulated that Minky Kraus, Sara Klein, Leah Klein and Leah Klein were office workers. I also conclude, based on the testimony of Chesky Herman that he spent most of his time doing office work and would therefore not be in the unit. The bargaining unit, therefore would consist of 38 people.

On or about August 5, 2008, some of the employees signed forms authorizing David Tykulsker, an attorney associated with the Union, to file a Fair Labor Standards Act lawsuit against the Company.

On August 12 or 13, 2007, a Complaint was served on the Company and it was filed with the Court on August 14, 2007. Specifically named Plaintiffs were Felipe Romero, Jose Pani, Justin Romero, Juan Jose Romero, Irma Juarez, German Romero, Bumaro Arenas, Altagracia Merced and Maria Corona. In essence, the Complaint alleged that the Company violated FLSA by failing to pay the proper overtime rate.

Also on August 13, 2007, the Union and certain of the Company's employees arranged to have a march to the plant and a demonstration outside its premises. Upon arrival, Randel spoke to Chen and demanded that the Company recognize the Union and pay employees the proper overtime. After a bit of chit chat, Randel extracted a promise that overtime would be paid and he acknowledged that the NLRB had an election procedure to determine if employees wanted representation. At that point, the employees entered the plant and went to work. The other participants in the demonstration stayed outside and made a good deal of noise for the remainder of the work day.

There is no dispute that on August 13, and various days thereafter, the Company's owner, Moishe Grunhut, asked a number of employees why they had invited in a union and asked what their problems were. The Respondent did not deny that when employees said that they had a variety of grievances, including the alleged failure to pay overtime, Grunhut told them that he would remedy their grievances. For example, Maria Corona testified that Grunhut approached her and Irma Juarez and stated that he was disappointed with them because they were bringing people in from the outside. She states that she told him that the Company didn't give paid vacations and didn't pay for overtime. According to Corona, Grunhut responded by saying okay, no problem, let's talk this out. Bulmaro Arenas testified that when he listed grievances after Grunhut asked why they had brought in a union, Grunhut stated that he would grant any requests.

Additionally, the undenied evidence shows that Grunhut held a meeting with employees in the pickle room where he asked them what they wanted and promised to remedy their grievances. The promises included paid vacations, holidays, sick days, overtime pay, a water cooler and a refrigerator. Juan Torres testified that Grunhut said, "I'm going to give you everything you need, but I don't want to know anything about the Union. "

In this regard, I conclude that the Respondent violated Section 8(a)(1) of the Act by (1) interrogating employees about the Union, (2) soliciting grievances and (3) promising to remedy them. *Honeywell Electronic Materials Mfg., LLC*; 352 NLRB No. 135.

At the end of the work day on August 13, 2007, the employees were told by Weiss that they should leave by the rear door. At the time, the demonstration was still taking place outside the facility and many of the employees had already arranged to join the demonstration after work. Although the General Counsel seems to find something nefarious in this, it is my opinion that telling employees that they could leave by the back door, in no way interfered with the ability of the employees to join the already noisy demonstration that was being held outside in the park.

On the evening of August 13, 2007, union representatives met with employees in the park outside the Company's plant. This was a public and somewhat noisy demonstration that took place in a public area. There was testimony that Weiss, on two occasions, parked his car at

the edge of the park until he was confronted by Randel and left. The General Counsel alleges that this was unlawful surveillance. I don't agree. For one thing, I do not conclude that Weiss was a supervisor. And for another, I don't think that this limited one time action, occurring in a public space, would constitute illegal surveillance.

There was testimony about another meeting with employees that took place around August 15, 2007. At this meeting, Chen spoke and a person named Norma Ramirez did the translating.[3] It seems that Chen told employees that they were going to get some new benefits including holidays, overtime and vacations; that they were going to be asked to sign some papers; and that they would have to follow some rules that would, among other things, bar them from talking about the Union or talking in groups at the Company. In these respects, the Respondent violated Section 8(a)(1) of the Act.

On or about August 16, 2007, employees were called upstairs to the office, one at a time. At these individual meetings, each employee was asked to sign two documents. One of the documents promised a group of new benefits. The other document purported to be a "release" pursuant to which the employee would be settling the overtime lawsuit in consideration of a payment of money.[4] (Most employees who signed the "release" received anywhere from $100 to $375). The first document essentially promised *inter alia*; that the work week would be 40 hours and that any more hours worked would be paid at time and a half; that employees with two years of service would get five paid days as vacation; that employees would get a certain amount of paid sick leave; and that employees would get a certain number of paid holidays.

Regarding the above, there is no question that the Respondent promised benefits in violation of Section 8(a)(1) of the Act.[5] Similarly, the evidence showing that the employer did, in fact, put these promises into effect, constitutes an illegal granting of benefits in violation of Section 8(a)(1) of the Act.[6]

However, I do not reach the same conclusion as to the "bonus" payments that related to the second document. Those payments were, in my opinion, an attempt, (no matter how futile), to ward off the potential liability of the overtime lawsuit that had previously been filed on behalf of these employees. While I cannot imagine that these "releases" would have any legal effect given the circumstances in which they were signed, I don't think that the money offered was to discourage employees from joining a union.

(c) Majority Status?

At meetings between August 23, 2007 and November 9, 2007, the Union's chief organizer, Billy Randel, solicited employees to sign petitions. An initial petition was signed on or about August 23, 2007 and this document was identified as GC Exhibit 10. Other employees

[3] It is a little unclear to me as to how Ramirez came to be at the plant. She apparently was a friend of Gloria Torres and Alta Gracia, two of the lead plaintiffs in the wage and hour lawsuit and originally leaders in the union organizing campaign.

[4] The first document was written in Spanish and the second document, (the release), was written in English.

[5] I do not conclude, however, that the promise to obey the law in relation to the Fair Labor Standards Act's requirement that employees be paid at time and a half for hours over 40, can be construed as the granting or promising of a new benefit.

[6] Included in the illegal grant of benefits would be paid holidays, paid vacations, a new refrigerator, a water cooler, and morning breaks.

signed additional pages of this petition at later dates and the combined document was identified as GC Exhibit 11. GC Exhibit 11 contains the signatures of 21 employees and the General Counsel contends that at least as of November 9, 2007, the Union represented a majority of the employees.

The text of GC 10 and GC 11 are in English only. And with respect to the signings, the evidence shows that although Randel speaks Spanish and solicited most of the signatures, he did not actually translate the text of the petition. The evidence also establishes that many of the people who signed these petitions could speak very little English and could not understand written English. The petition reads as follows:

> As workers who make the food industry possible, we are committed to improving our life at work. We must do our part to counter the sweatshop conditions in our industry. The work we do must be valued and respected. We are committed to looking out for each other and helping to build a more just and democratic society. To that end we have organized a Union with the Industrial Workers of the World, Industrial Union 460/640. We each hereby authorize the IWW to be our exclusive collective bargaining agent for the purposes of mutual aid and the negotiation of wages, hours and other terms and conditions of employment. All for one and one for all.[7]

In addition to the petitions, the Charging Part offered evidence showing that at least some employees signed application for membership cards. In this regard, the Union introduced into evidence cards signed by five employees. I note however, that the text of these cards, which are in English and Spanish, do not explicitly authorize the Union to represent employees.

The Union also introduced evidence that at one time or another, some employees paid union dues. In fact, the evidence shows that on August 13 and 15, 2007, 18 employees paid $6.00 as dues. However few employees continued to pay dues after that date. Thus, the highest number of employees who paid dues was 18 and this would not constitute a majority even if, as the General Counsel contends, the appropriate unit would consist of 37 employees.

One of the positions taken by the Respondent is that the Union did not have majority support because many of the employees who signed the Union's petition were non-citizens who could not legally work in the United States. This position is somewhat analogous to saying that because they could either be deported or denied legal employment at any time, these employees should be construed as contingent employees.

In support of its position, the Respondent's counsel sought to cross examine employees regarding their legal status. I sustained the General Counsel's objections to this line of questioning on the basis that the Board has already concluded that "unless and until the employees are declared to be illegal and are discharged and/or deported, they remain employees … under the Act" and that they are lawful voters in an election. *Agri Processor Co.*, 347 NLRB 1200, fn. 2 (2006).

[7] Although not necessarily fatal, I note that the portion of the paragraph that authorizes the Union to represent employees comes after a good deal of old time rhetoric. Even assuming that the person who signed the petition had more than a rudimentary understanding of written English, it would be conceivable that he or she would not fully understand that she was authorizing the Union to bargain on her behalf.

The real problem with the Union's majority status concerns the petition and what the employees were told the petition was for. There is no dispute that many of the employees could not read the petition because it was in English. There is also no dispute that the employees were told in Spanish that the petition was going to be used to obtain an election at the National Labor Relations Board. The question is, were they told anything else? And basically this comes down to which of the General Counsel's own witnesses do I think most accurately describe the events that took place.

Jose Juan Romero testified that Randel told employees that the petition was a document by which his union would get inside instead of the Union that the Company was recommending to the employees. This recollection is obviously not correct because any suggestions by the Company that the employees should join a different union did not happen until much later. He also answered affirmatively when, on cross examination he was asked if the union representative said that the petition was for the purpose of having an election.

Juan Torres testified that he signed the petition because he wanted to become a union member. This by itself is irrelevant as his subjective intent or desire is not material. *Advance Mining Group*, 260 NLRB 486, 508 (1982). On cross examination, Torres testified that the petition was described as "some kind of affiliation."

Bulmaro Arenas similarly testified that he signed the petition because he wanted the Union to represent him. When asked on cross examination if Randel had told the employees that the petition was for an election, he said yes. Based on my review of his testimony, I can't really say whether Arenas remembered that Randel said that the petition was for the purpose of getting an election or that it was to allow the Union to represent them. Or both.

Maria Corona and Marcelina Ramirez, testified that they signed the petition because wanted the Union to get better working conditions. As noted above, their testimony describing their previous subjective intent is not relevant. Neither's testimony indicates what if anything Randel said about the purpose of the petition.

Irma Juarez's testimony was particularly vague. According to her, Randel said that the petition was "something like for us to become union members." She also testified that he said that there would possibly be an election.

Olga Maria Fabian Alonso testified when asked about the petition, Randel said that this was going to be supporting us and that he was going to be our representative of the Union. She also testified that Randel said that the petition could be beneficial for voting.

Gloria Torres testified that Randel said that it was for the Union to represent her. When asked on cross examination if Randel said anything about an election, she unlike most of the other employees, said that he did not. Her memory is also put in doubt by the fact that she said that Randel translated the petition, an assertion neither recalled by Randel or any other employees.

Felipe Romero's testimony was that Randel had the employees sign in order to see if they accepted the Union and that there would be a vote to see if they accepted the Union. When asked if Randel said that there would be a vote if the petition was signed, he said yes.

Justino Romero testified that Randel said that the petition was a contract that the employees were making with the Union. When asked on cross examination if Randel said that the petition was for an election, he said yes.

Placido Romero testified that Randel told the employees that if they signed the petition that they would be part of the Union. He further testified that Randel said that he had spoken to the owner and that he, (presumably the owner), wanted to have an election to see who wanted the Union.

I should note here that I do not doubt that the employees were being truthful and that they did their best to recall what Randel told them about the petitions. That is not the issue. The issue is whether they have accurately recalled the event. And in this regard, I note that not only did they sign these petitions more than a year ago, but that some probably signed the previously described application for membership cards at or about the same time that they signed either GC 10 or GC 11. They therefore could have easily conflated the two transactions.

In contrast to the employees, Billy Randel was completely sure about what he told the employees regarding the petitions. And not only was he certain, but his testimony indicated that he followed his normal pattern when asking employees to sign such a document. He testified as follows:

> BY MS. LIPIN:
> Q Mr. Randel, if you would take a look at General Counsel's exhibit 10 in front of you?
> A Yes.
> Q You were present when a certain number of employees that you've already testified about signed that document --
> A That's correct.
> Q What did you tell those who signed about what they were signing?
> A They were signing a petition to have a government supervised secret ballot election.
> Q Did you --
> A To decide whether or not the company would have to recognize The Industrial Workers of the World as The Union for the workers.
> Q Did you tell them anything else about putting their names down?
> A Yes.
> Q What else did you tell them?
> A I explained to them that their names on this petition were confidential, and the only ones that would see it would be myself and potentially one or two other representatives from The Union, as well as a government official.
> Q And did you say anything else when you were present with them while they signed?
> A Probably joking around. I mean, you know, I might have said -- we might have spoken about it, but, you know, nothing other than that sticks in my mind, as far as that goes.
> * * * *
> THE WITNESS: I mean I don't recall my exact words to my --to the membership at Flaum of Flaum workers, alright?
> JUDGE GREEN: But is there a standard --
> THE WITNESS: There is a standard thing which explains to the workers what this is, what the process is, that it's confidential, that a secret ballot election may very well take place, which would determine if we win, and the company is required under law to negotiate an agreement, alright? Or I should say negotiate with The Union, alright? Who sees the petition, and that sort of thing. And that there would be an observer at an election. One of the members would be an

observer. And that the company would have -- you know, just the standard things, you know, as far as
JUDGE GREEN: So you described the election process?
THE WITNESS: Right, I described the process. In fact one -- the -- both field representatives of The Union also described the process to the workers, because they had previously gone through it in their shops.
BY MS. LIPIN:
Q Did you say anything to the workers about whether it indicated support for The Union?
* * * *
MS. LIPIN: Do you remember the question?
THE WITNESS: To the effect of whether it would show support for The Union, if I'm not mistaken, is that correct?
JUDGE GREEN: Yeah, right.
THE WITNESS: If I said anything to that effect? No, I don't believe I did say anything to that effect.

(d) Events from September 2007 to May 2008

On August 27, 2007, the Charges in 29-CA-28502 and 29-CA-28675 were filed by the Union.

On September 2, 2007, the Union faxed to the Employer a demand for recognition plus a list of specific contract proposals.

Felipe Romero testified that in early September 2007, Grunhut, in the context of a discussion of the Union, promised to switch him to the day shift. This was not denied and I construe this as an additional promise of benefit made for the purpose of trying to dissuade employees from supporting the Union.

On September 28, 2007, the Union filed a petition in Case No. 2-RC-15510. For the showing of interest, the Union filed the previously described petitions that are GG Exhibits 10 and 11.

Maria Corona testified that at some time in October 2007, plant manager Chen and Norma (Ramirez) held a meeting with some employees and told them that they would have to sign some documents within two weeks otherwise there would be a problem with Immigration. She also testified that Ramirez said that if the employees bring a union in here, “you will have problems with immigration.” An event similar to this was, to some degree, corroborated by Jose Juan Romero who testified that in October 2007, when he was in the kitchen he heard Norma tell another worker that if he wanted to bring in the Union, he had to bring in I.D. papers. As indicated above, it is my opinion that when Norma Ramirez acted as an interpreter, she should be construed as an agent. As such, and in the absence of any denial either by her or Chen, I will conclude that the Respondent violated Section 8(a)(1) by, in effect, threatening employees with being reported to Immigration authorities if they supported the Union.

On November 15, 2007, the Employer executed a Stipulated Election Agreement and initially, the Union filed a request to proceed. (This is a request by the Union that the election go forward as planned even though the previously filed unfair labor practice charges had not yet been resolved).

On December 12, 2007, the Union filed a charge in 29-CA-28675 and a Complaint was issued on December 21, 2007. At the same time, the Union withdrew its request to proceed and consequently the election was put in abeyance.

In January 2008, the Respondent enlisted the help of a person named David Ganz to speak to the employees. (He was assisted by Carmen who translated for him). Mr. Ganz is the director of an employer association that apparently has some relationship with another union. At a meeting where he was introduced to the employees on the Company's premises, Ganz told the employees that he had a good union for them, that this union would be better than the IWW, and that if they had any problems, they should go see him. Ganz told employees that "Billy's union" was useless and that it didn't even have an office. At one point in the meeting, Carmen is alleged to have said that Billy's union could not get someone's job back if they were fired.

The General Counsel suggests that the statements by Ganz and Carmen amount to an assertion by the Respondent that selecting the IWW would be futile. At most, Ganz told the assembled employees that his organization had a relationship with a union that in his opinion was better than "Billy's union" and that if they wanted any help, employees could call him. Similarly Carmen's remarks, even if attributable to the Respondent, do not suggest that selecting the IWW would be completely futile. All it suggests is that if an employee was discharged, the IWW might not be able to get that person reinstated. (This would be a true statement, even if there was a union contract containing a grievance/arbitration clause). In short, I do not think that either's statements can be construed as being violative of the Act.

I do note however, that at this meeting, Irma Juarez strongly indicated that she and other employees supported the IWW. Maria Corona was also at this meeting.

According to Irma Juarez, about a week after the meeting with Ganz, Carmen told her that she was being switched from the salad area, (where she worked with Maria Corona), to the kitchen. Prior to this, she and Corona had worked for several years in the salad area and had not received any complaints about their work.

Juarez testified that when she complained that she could not work in the kitchen because of the heat, Carmen said, in effect, that if she didn't want to work in the kitchen, she should get another job. Juarez testified that Chen, on one occasion, told her that he didn't want her talking to Maria Corona or another employee named Bulmaro Arenas. Juarez also testified that on another occasion, after the transfer to the kitchen, she was temporarily assigned back to the salad area by Carmen but that Chen said that he didn't want to see Juarez together with Corona.

In my opinion, the credited testimony of Juarez indicates that she was transferred from the salad area to the kitchen because the Respondent did not want her talking to other employees about the Union. Based on the fact that this transfer occurred shortly after the Ganz meeting where Juarez vocally expressed her support for the IWW, it seems to me that the transfer was likely intended to eliminate or reduce some of the pro-union talk at the factory. In the absence of any contrary explanation offered by the Respondent, and based on the rationale of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I am going to conclude that the transfer of Juarez was motivated because of her pro-union activities and therefore violated Section 8(a)(1) and (3) of the Act.[8]

[8] Although concluding that this transfer was motivated by anti-union considerations, I do not think that the evidence supports a conclusion that working in the kitchen was more onerous than working in the

Continued

On April 2, 2008, the Union filed a charge in 29-CA-28855 and this specifically mentioned Maria Corona in the body of the charge.

According to Corona, in early April, 20008, she was called into Chen's office and he told her that he had received a charge that had her name in it. Corona testified that Chen asked her what she was doing at the labor department. She states that when she responded, he said that this was okay; that there was no problem and that she could do what she wanted. She testified that he told her that in the future, if she went to an appointment, she should give him a paper showing where she was going.

The General Counsel contends that the Respondent violated Section 8(a)(1) and (3) by creating a new rule applicable only for Corona, which, in effect, required her to notify the Respondent about any appointments that she had to leave work for.

On cross examination, Corona admitted that Chen did not tell her that she could not go to appointments. Nor does the evidence show that the Respondent, at any time thereafter, barred her from leaving work for any reason.

The mere fact that Chen told Corona to notify him in advance when she was going to leave work, does not, in my opinion, amount to a consequential change in her terms and conditions of work, especially as there was no attempt by the Respondent to prohibit Corona from taking time off to attend to doctor's appointments or other matters. I therefore shall dismiss this allegation of the Complaint.

In early April, 2008, the Respondent posted a notice containing the Company's Rules and Regulations. These stated:

Starting & Ending Time

Regular work hours 7:30AM to 5:30 PM (hour changes can be made by management).
All production employees must be in their working station by 7:30 AM.
Time cards must be punched at the beginning and end of your shift (and for your meal break).

Dress Code

All employees in production area must have hairnets, gowns, gloves and working shoes at all time, must not wear any jewelry and watches.
No: Earrings, Rings, Watches, Necklaces, Flip flop.

Coffee and lunch break

Coffee break is from (9:00 AM to 9:15AM)
Lunch break is from 12:30AM to 1:00 PM
Employees are not allowed to leave the premises during the lunch break unless punching out and in by returning.
Before going out to break all products must be place in the cooler.
Food is not allowed in the building except lunchroom.
Talking on cell phone is not allowed during working time.

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salad area. I also note that this transfer did not affect her pay or benefits. Accordingly, no back pay liability has been incurred because of this action.

The General Counsel contends that the implementation of certain of these rules, to the extent that they were new, constituted a violation of Section 8(a)(5) of the Act, because they were made without offering to bargain with the Union. Obviously the efficacy of this claim will depend upon whether a bargaining order, retroactive to this time, would be appropriate. That will be discussed at a later point in this decision.

Additionally, the General Counsel contends that in relation to the above set of rules, the Respondent violated Section 8(a)(1) & (3) by requiring employees to punch in and out during lunch breaks. I do not agree.

In August 2007, some of the employees filed a lawsuit alleging that the Respondent had violated the Fair Labor Standard Act's requirements regarding overtime pay. As the required overtime rate is calculated after 40 hours of week, it is incumbent on an employer to have some means to determine the hours worked by its employees. This usually is accomplished by installing a time clock. And apart from paid time for breaks, an employer is not required to pay for time spent outside the plant during lunch time. I therefore conclude that it is unlikely that this requirement was motivated by the employees' union activities. Rather, I think that it is far more probable that the Respondent adopted this rule in order to comply with the law's overtime requirements.

(e) The work stoppage on May 26, 2008

On Thursday, May 22, 2008, Maria Corona was told that there was no more work for her. In this regard, the General Counsel *is not* alleging that her layoff or discharge violated Section 8(a)(3) of the Act.

On Sunday, May 25, many of the employees met with the Union. At this meeting they all agreed that they would go on strike if the Company did not reinstate Corona on Monday.

On Monday, May 26, the employees went to work and Corona went to the plant to talk to Chen. When Chen refused to reinstate Corona, the employees changed out of their uniforms and got ready to leave the facility. At this point, Chen confronted them by blocking the exit door and said that if they left, they no longer would have work there. (Based on the combined testimony of many people, I do not conclude that these employees were told that they would be fired or discharged).

Given the totality of the circumstances, I think that Chen was, in effect, clumsily trying to get the employees to stay on their jobs[9] Nevertheless, 16 of about 38 unit employees left the plant and joined a previously planned picket line. The employees who engaged in the strike were:

Bulmaro Arenas	Isidro Varga
Jose Juan Romero	Juan Torres
Placido Romero	Gloria Torres
Irma Juarez	Justino Romero Perez

[9] Cf. *C&W Mining Co., Inc*., 248 NLRB 279 (1980) and *Kerrigan Iron Works, Inc*., 108 NLRB 933 (1954, affd. 219 F.2d 874 (6th Cir. 1955). In those cases the Board has held that it is sometimes difficult to determine whether an employer has actually discharged employees or has attempted to intimidate employees in an effort to deter them from engaging in a strike.

Olga Maria Fabian Alonso	German Romero
Veronica Cortez	Felipe Romero Perez
Herlinda Cortez	Nataniel Nava
Micaela Cortez	Gustavo l/n/u

Although the Respondent asserts that these employees quit their employment, this contention is rejected. Clearly, these employees were engaged in a strike, whose main purpose was to get Maria Corona reinstated.

Aviram Chen admits that on or about May 27, Grunhut offered to rehire Maria Corona.

Based on the information that Corona had been offered her job back, Randel sent the following fax to Grunhut on May 28:

> Dear Sir,
>
> Please be advised that in light of your offer to reinstate Maria Corona, she and all union members employed by Flaum Appetizing Corp. stand ready, willing and able to return to work without further conditions, no later than noon today. Please advise the undersigned immediately if you will not permit these workers to return to work.

Notwithstanding this offer to return to work, the Respondent refused to reinstate the strikers and instead began hiring replacement workers. (The Respondent did not produce any evidence that any people hired before or after May 18, 2008 were employed as permanent replacements).[10]

About two months later, on July 17, 2008 the Union sent a letter to the Company which contained another offer to return to work. This, however, had a number of other conditions.

The Respondent contends that the offers to return to work were conditional and therefore it had no obligation to respond by reinstating the strikers. I do not agree.

While it is true that the second offer on July 17, 2008 was conditional, that would be irrelevant if the first offer, on May 28 was not. To an extend, the May 28 offer to return, although unconditional on its face, might be construed as conditional inasmuch as the evidence shows that the strikers had already agreed that they would not return to work unless Maria Corona was offered reinstatement. But if that was the condition for returning to work, that condition had already been fulfilled because the Respondent had offered, on May 27, to reinstate Corona. Thus, as of May 27, that condition no longer existed and therefore, the May 28 offer was, in effect, without any prior conditions.

Sixteen employees initially engaged in an economic strike starting on May 26, 2008. Given the fact that an unconditional offer to return to work was made on their behalf on May 28, and the fact that no permanent replacements were hired either before or after the offer was made, the Respondent violated Section 8(a)(1) and (3) by failing to reinstate them. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375 (1967); *Laidlaw Corporation*, 171 NLRB 1366. Moreover, because Maria Corona refused the offer to return to work when the Respondent refused to reinstate the other strikers, she should also be considered to be a striker.

[10] General Counsel Exhibit 33 is a summary of those people hired after May 28, 2008. There also was testimony as to when they were hired and, in some cases, when they left.

(f) The 8(a)(5) Allegations

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the "exceptional" case where "outrageous" and "pervasive" unfair labor practices are committed. The second category involves "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely if at some relevant point in time, the Union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a "minimal impact" on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

The unfair labor practices that I have found in this case fall into three time periods. The first period, from late August to September 2007, involved a number of situations where the Respondent unlawfully interrogated employees, solicited grievances and promised and granted a variety of benefits. None of these unfair labor practices would, in my opinion, constitute "hallmark" violations that would warrant a bargaining order.

The next phase, from September 2007 through April 2008 involved a few sporadic and relatively minor unfair labor practices. These would not, in my opinion, add much to the previous violations in terms of warranting a bargaining order.

The final incident involving the Company's refusal to reinstate the strikers is the equivalent of a mass discharge of union supporters that is far more serious and would be grounds for granting a bargaining order. See *National Steel Supply Inc*., 344 NLRB No. 121; *Electro Voice, Inc*., 320 NLRB 1094 (996); Adam Wholesalers, Inc., 322 NLRB 313 (1996); America's Best quality Coatings corp., 313 NLRB 470 313 (1993); and *Flexsteel Industries*, 316 NLRB 745 (1995). Cf. *Wake Electric Membership Corp*. 338 NLRB 298 (2002).

However, the basic question in this case is whether the Union at some relevant time enjoyed majority support. When the employees signed the Union's petitions in August and November 2007, the unfair labor practices were not sufficiently egregious to warrant a bargaining order. On the other hand, when the really serious violation occurred, in late May, 2008, the petitions might be construed as being "stale." And if one were to view the strike as an objectively manifested expression of union support, it is noted that only a minority of the unit employees engaged in the strike.

In this case, the Union and the General Counsel are asking that a bargaining order be granted in the absence of a secret ballot election. Because elections, under the current law, are the preferred way of determining whether employees wish to be represented by a union, the granting of a bargaining order should be accompanied by substantial evidence that a majority of the employees in an appropriate unit have objectively manifested an intent to authorize a union with the right to bargaining on their behalf.

Because the bargaining unit consists of between 37 and 38 employees, the General Counsel must show, at the very least, that 19 employees authorized the Union to represent them for collective bargaining purposes. (If the unit is 38 employees, then the General Counsel has to show that 20 employees authorized union representation).

In essence, the evidence offered to prove that employees had authorized the IWW to represent them for bargaining purposes, boils down to the petitions that they signed and which were then used for the showing of interest in the representation case. In this regard, the union cards that some signed, simply do not authorize the Union to bargain. By the same token, the fact that a *minority* of the bargaining unit paid some money to the Union as dues, cannot be the basis for showing that a majority had selected the Union as their bargaining agent.

The petitions that were signed do authorize the Union to represent them for the purpose of collective bargaining. The problem is that the petitions were written only in English and most of the employees who signed them could not read English. The evidence shows that Billy Randel, the union agent who solicited the signatures, spoke to the employees in Spanish, but that he did not actually translate the wording on the petitions.

As described above, the employees who testified were inconsistent as to what they were told and in some instances merely described their subjective desire to join the Union. I have already indicated that I thought that these employees were trying to tell the truth but that it was likely that they did not correctly remember the transaction and/or that they conflated the signing of the petition with the signing of the union cards.

Therefore, it is my conclusion that when Randel solicited signatures on the petitions, he told the employees that the purpose of the petitions was to obtain an NLRB conducted election. Moreover, it is evident from his testimony that the only purpose that he described was to obtain an election.

It may be that the employees who signed the petition, subjectively desired the Union to represent them in bargaining with the Respondent. But the objective evidence is that this was not what they were told. Since most could not read the language that authorized bargaining and since that language was not translated to them into Spanish, I simply cannot say that these employees objectively manifested an intent to authorize the Union to bargain on their behalf. Based on what they were told, it is equally or more probable that some or all of them merely understood that if they signed the petitions they would later have a chance to vote on whether they wanted union representation.

Here we have a case where the petitions have unambiguous language authorizing the Union to represent employees. On the other hand, that language could not be read by many of the people who signed the petitions and the language was not translated into Spanish. While the employees were not told that the petitions' only purpose was to get an election, the fact is that the only purpose that they were told was that they were to get an election. In these circumstances, I cannot conclude that the employees in this case have objectively manifested an intention to have the Union represent them for collective bargaining purposes. *Nissan Research and Development Inc*., 296 NLRB 598 (1989).

Based on the above, I therefore shall recommend that the 8(a)(5) allegations of the Complaint be dismissed.

Conclusions of Law

(a) By interrogating employees about their union activities and sympathies, the Respondent has violated Section 8(a)(1) of the Act.

(b) By soliciting employees' grievances and promising to remedy them for the purpose of inducing them to refrain from supporting the Union, the Respondent has violated Section 8(a)(1) of the Act.

(c) By granting various benefits to employees for the purpose of inducing them to refrain from supporting the Union, the Respondent has violated Section 8(a)(1) of the Act.

(d) By telling employees that they could not talk about the Union at the facility, the Respondent has violated Section 8(a)(1) of the Act.

(e) By transferring employee Irma Juarez to a different job because of her union activities and in order to prevent her from talking to other employees about the Union, the Respondent has violated Section 8(a)(1) of the Act.

(f) By threatening to cause immigration problems if employees supported the Union, the Respondent has violated Section 8(a)(1) of the Act.

(g) By failing and refusing to reinstate employees who engaged in an economic strike, upon an unconditional offer to return to work, the Respondent has violated Section 8(a)(1) and (3) of the Act.

(h) The Respondent has not violated the Act in any other manner encompassed by the Complaint.

(i) The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to reinstate strikers, it must, to the extent it has not already done so, offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

With respect to Irma Juarez, the Respondent must offer to reassign her to the salad department.

I further recommend that the Respondent be required to expunge from its records any reference to the unlawful refusal to reinstate the strikers and the unlawful reassignment of Irma Juarez.

The Respondent contends that most of the employees were illegal aliens and that pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), they would neither be entitled to reinstatement nor backpay. That may or may not be correct. But the proper time to resolve that issue would be at the Compliance stage of this proceeding. *Tuv Taam Corp*., 340 NLRB 756, 760 (2003)

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [11]

ORDER

The Respondent, Flaum Appetizing Corp., its officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Interrogating employees about their union membership or activities.

(b) Threatening employees with immigration problems if they support the Union.

(c) Soliciting employees' grievances and promising to remedy them for the purpose of inducing them to refrain from supporting the Union.

(d) Granting various benefits to employees for the purpose of inducing them to refrain from supporting the Union,

(e) Telling employees that they could not talk about the Union at the facility.

(f) Transferring employees to different jobs because of their union activities or in order to prevent them from talking to other employees about the Union,

(g) Failing and refusing to reinstate employees who engaged in an economic strike, upon an unconditional offer to return to work.

(h) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bulmaro Arenas, Jose Juan Romero, Placido Romero, Irma Juarez, Olga Maria Fabian Alonso, Veronica Cortez, Herlinda Cortez, Micaela Cortez, Isidro Varga, Juan Torres, Gloria Torres, Justino Romero Perez, German Romero, Felipe Romero Perez, Nataniel Nava, Maria Corona and Gustavo l.n.u., full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of this decision.

(b) Make whole, with interest, the employees named above for the loss of earnings they suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against the above named employees and within 3 days thereafter, notify them in writing, that this has been done and that any such references will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Brooklyn, New York, copies of the attached notice marked "Appendix." [12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 13, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 18, 2009.

_____
Raymond P. Green
Administrative Law Judge

[12] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union membership or activities.

WE WILL NOT threaten employees with immigration problems if they support Local 460/640 Industrial Workers of the World a/k/a Industrial Workers of the World, New York City General Membership Branch, or any other labor organization.

WE WILL NOT solicit employees' grievances and promise to remedy them for the purpose of inducing them to refrain from supporting the Union.

WE WILL NOT grant benefits to employees for the purpose of inducing them to refrain from supporting the Union,

WE WILL NOT tell employees that they cannot not talk about the Union at the facility.

WE WILL NOT transfer employees to different jobs because of their union activities or in order to prevent them from talking to other employees about the Union,

WE WILL NOT refuse to reinstate the employees who engaged in an economic strike.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

WE WILL offer Bulmaro Arenas, Jose Juan Romero, Placido Romero, Irma Juarez, Olga Maria Fabian Alonso, Veronica Cortez, Herlinda Cortez, Micaela Cortez, Isidro Varga, Juan Torres, Gloria Torres, Justino Romero Perez, German Romero, Felipe Romero Perez, Nataniel Nava, Maria Corona and Gustavo l.n.u., who have been found to have been illegally refused reinstatement and offering unconditionally to return to work, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL offer Irma Juarez immediate reinstatement to the salad department.

WE WILL make whole the employees named above for the loss of earnings they suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the acts which have been concluded to be unlawful and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

FLAUM APPETIZING CORP.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.